IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 246

HERMAN MOSES, ROBERT ALLEN, JR., LARRY MAURICE, LAWRENCE JERRY, DONALD JERRY, STAN MOSES, BURT MOSES, EDWIN B. DANIELS, HOWARD MOSES, BETTY GOUDY, HENRY KING GEORGE, WALTER ALLEN, ANDY DOMINICK, ARCHIE LEBEHAN, CECIL MOSES, and the MUCKLESHOOT TRIBE OF INDIANS,
Appellants,

v.

THE STATE OF WASHINGTON, THE DEPARTMENT OF FISHERIES, and THE DEPARTMENT OF GAME,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS

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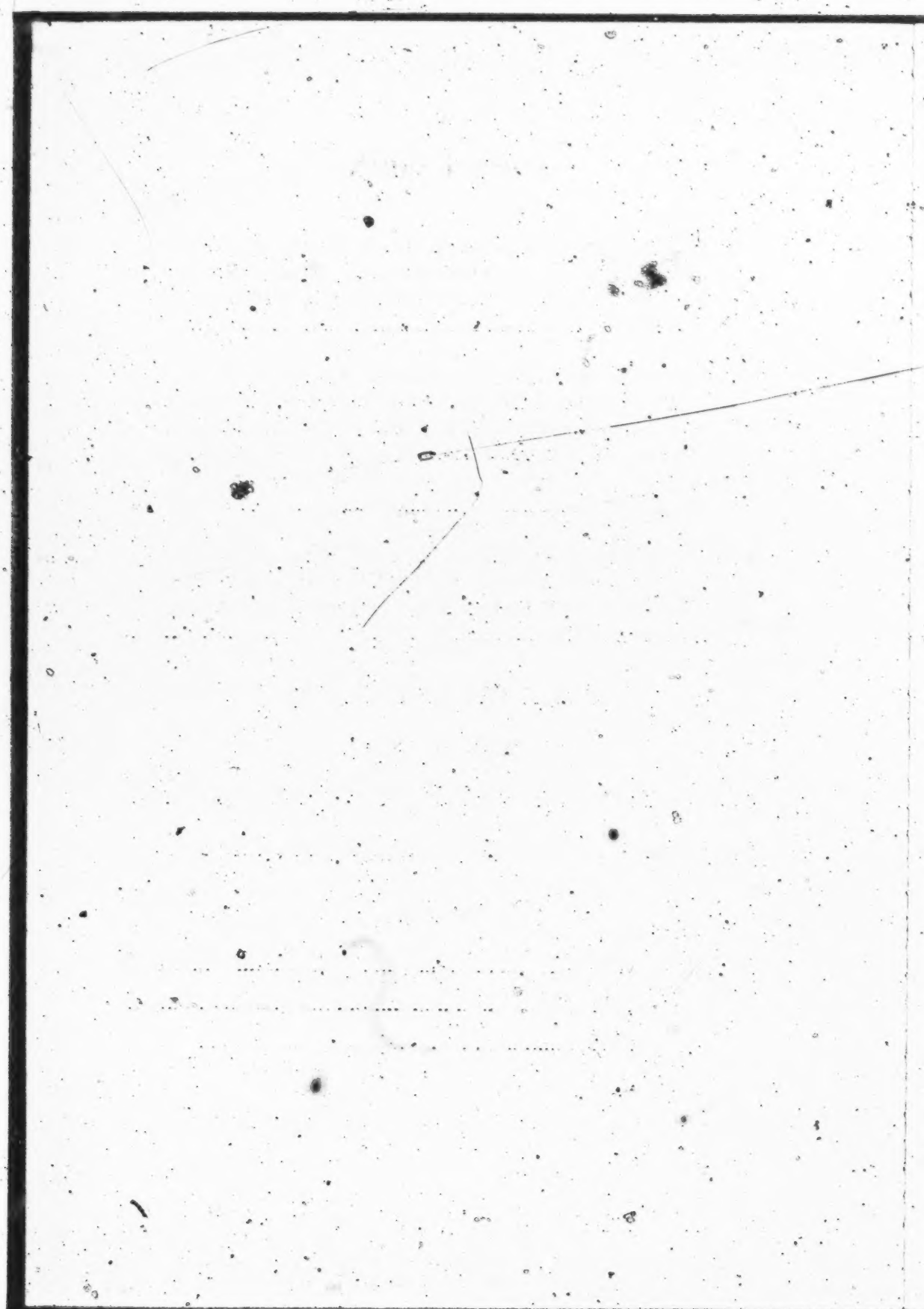

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I.

The Declaring of a Party to a Treaty as Not a Party Is Such a Fundamental Attack on the Treaty That It Is Equivalent to a Holding of Invalidity

Appellees' first point is that the State Supreme Court "construed" a treaty, rather than declared it invalid; *ergo*, no appellate jurisdiction lies in this court.

When a party to a treaty has been, by the state courts, read out of the treaty, it is such a fundamental attack on the treaty that it is equivalent to a holding of invalidity. Appellate jurisdiction does lie.

And, of course, if appellants be wrong, they rely on 28 U.S. Code 2103, and request the papers to be a Petition for Certiorari. No argument has been advanced by the appellees that this case is not one of public importance, and so appellants rely on their opening brief to support the same. Adopting the appellees' statement that the state court merely "construed" a treaty, even so, construing a treaty is within the certiorari jurisdiction of this court; but again, appellants assert that a destruction of a treaty as to these parties is a declaration of invalidity.

II.

Determining Who the Parties Are to a Treaty Is a Substantial Federal Question; the Construction of a Treaty Which Protects Indian Fishing Rights and the Determination of the Regulatory Authority of the Same Are Substantial Federal Questions

Appellees' second point asserts that no substantial federal question is involved.

Two broad questions are raised: A. Is the Point Elliott Treaty valid as to the Indian tribes and their members; and, B. If so, what is the extent of state regulatory powers in the regulation of treaty-protected property rights.

We cannot think of a more fundamental federal question than the determination of who are parties to a treaty. Justice Cardozo spelled out the rule in discussing district court jurisdiction in *Gully p. First National Bank*, 299 U.S. 109 (1939), at page 112, as follows:

> "How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United

> States must be an element, and an essential one, of the plaintiff's cause of action. . . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect and defeated if they receive another."

If the Point Elliott Treaty is construed to include the Muckleshoot tribe, then one series of rights evolve; and if contrarywise, then the Muckleshoots are without standing: *ergo*, there is appellate jurisdiction. (Interestingly enough, the justice cited *King County v. Seattle School District*, 263 U.S. 361, 363, 364.)

The second broad issue of the state's regulatory power and the extent thereof relates to 28 U.S. Code 1257 (2), which confers jurisdiction on this court by appeal where "is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, *treaties* or laws of the United States and the decision is in favor of its validity." (Emphasis supplied.)

Here the judgment reads (Tr. 3):

> "The individual defendants and all members of the Muckleshoot tribe are hereby permanently enjoined from fishing in the Green River in any manner that is contrary to the laws of the State of Washington or contrary to the rules and regulations of the Department of Fisheries of the State of Washington or the Department of Game of the State of Washington."

Thus, certain unidentified state statutes and regulations have been declared valid as opposed to treaty-protected fishing rights.

And certainly, under certiorari jurisdiction of 28 U.S. Code 1257(3), the appellants claim a "right (or) privilege" "under the Constitution, treaties or statute of . . . the United States."

III.

The Federal Questions Were Timely Raised in the Trial Court and Decided by It, and Were Timely Raised in the State Supreme Court and Decided by It

Appellees' third point relates to the lack of timeliness in raising the federal questions sought to be reviewed.

In addition to the citations on timely raising the federal questions described in Appellants' Jurisdictional Statement, there exists the following:

At the trial level, the court entered the following Conclusions of Law:

"II.

"That the Skope-ahmish band of Indians residing on the upper Green River were not signatories of the Point Elliott Treaty, and that their descendants, who are members of the present-day Muckleshoot tribe, acquired no rights by virtue of said treaty." (Tr. 12)

• • •

"IV.

"That if the Treaty of Point Elliott were to be interpreted as having been made for all Indians residing within the ceded area, which would have included the Skope-ahmish and thus, although not signers of the treaty, the aboriginal ancestors of the descendants were entitled to the benefits of the treaty, the court would have made the following conclusions; and does make them for the purpose of this case:

"V.

"That the anadromous fish conservation program of the State of Washington as it affects the Soos Creek Hatchery and the Green River are integral and necessary parts of an overall state conservation program.

"VI.

"That to permit the defendant Indians to fish as they did in September, 1963, and as they most probably would do in the future if not restrained, would seriously hamper and ultimately destroy the effectiveness of the state's conservation program, particularly as applied to the Soos Creek Hatchery and the Green River.

"VII.

"That if the treaty is considered to have been negotiated for the benefit of all persons whose lands were taken so as to vest in these defendants any rights, such rights could fully be satisfied by the Washington State Department of Fisheries delivering to that portion of the Muckleshoot Tribe who have Skope-ahmish blood, the carcasses of ten per cent of the fish removed from Soos Creek for use by the hatchery. This would be consistent with what the state maintains it has been doing, and proposes to do in the future, except possibly that the number of fish might be in excess of what might have been delivered. This would mean, if this were done—the run of Chinook Salmon exceeded twenty-five thousand at the hatchery, if I remember the figures correctly, and it would mean that they would turn over to those Indians about twenty-five hundred of each species of fish during a given year. In this manner the number taken under these circumstances would in no way affect the maintenance of the program of conservation and yet would permit these Indians to receive the amount of fish consistent with what their ancestors removed from the stream for their subsistence maintenance. Such use of the Green River and delivery of fish to the descendants of the Skope-ahmish Indians would be consistent with the law as presently existing in this state under *State v. McCoy*." (Tr. 12)

At the State Supreme Court level, appellants in their Brief of Appellants, at p. 20, stated:

"The trial court should have concluded that the

members of the Muckleshoot Tribe have the same rights under the Treaty as do members of other tribes named in the Treaty. . . .

• • •

"3. The trial court should have been guided by the United States 9th Circuit Court decision in *Maison etc. v. State of Oregon, supra.* It was bound to find as did the Honorable Frank D. James that complete exclusion of Indians from fishing upstream from the Soos Creek Hatchery was not indispensable to conservation of the fish run, and should have made a reasonable provision for Indian fishing upstream. Instead the court recommended that the State of Washington give the Indians salmon carcasses from the hatchery until they are paid for their lands by the United States Government which is a meaningless gesture on the part of the court. The appellants object to receiving carcasses as a substitute for their right to fish."

The State Supreme Court began its decision in the instant case (Jurisdictional Statement A-46) as follows:

"This is an action involving claimed off-reservation treaty fishing rights by Indian defendants; and it is a companion case to that of the Puyallup Indians (70 W.D.2d 241, P.2d -), and of the Nisqually Indians (70 W.D.2d 270, P.2d -), filed today but presenting a different facet of the problem."

Then the court considered whether or not the appellants were members of a tribe which was party to the Point Elliott Treaty and concluded that portion of its argument, both as to the signatory problem and the subjunctive problem of what the court's decision would have been had the Muckleshoot tribe been such a signatory, by concluding (Jurisdictional Statement A-50):

"Having discussed the over-riding issues. . . ."

Thus, appellees third point that the issues were not timely raised or considered by the state courts is without foundation.

Wherefore, appellants pray that the Motion to Dismiss be overruled.

Respectfully submitted,

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